

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASSANDRA JOHNSON,)	Case No. CV 07-507 JC
Plaintiff,)	
v.)	MEMORANDUM OPINION
)	
MICHAEL J. ASTRUE, ¹)	
Commissioner of Social)	
Security,)	
Defendant.)	

I. SUMMARY

On January 25, 2007, plaintiff Cassandra Johnson (“plaintiff”) filed a Complaint seeking review of the Commissioner of Social Security’s denial of plaintiff’s applications for benefits. On October 1, 2007, the parties filed a Joint Stipulation (“JS”) setting forth their respective positions on plaintiff’s claims. On July 23, 2009, the matter was transferred and referred to the current Magistrate Judge. The parties thereafter filed consents to proceed before the current Magistrate Judge. On August 13, 2009, the matter was formally reassigned to the

¹Michael J. Astrue is substituted as Commissioner of Social Security pursuant to Fed. R. Civ. P. 25(d)(1).

1 instant Court for final disposition. The Court has taken this matter under
 2 submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15.

3 Based on the record as a whole and the applicable law, the decision of the
 4 Commissioner AFFIRMED. The findings of the Administrative Law Judge
 5 (“ALJ”) are supported by substantial evidence and are free from material error.²

6 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE** 7 **DECISION**

8 **A. Previously Adjudicated Applications**

9 On or about August 13, 2001, plaintiff previously filed applications for
 10 Supplemental Security Income and Disability Insurance Benefits due to seizures
 11 and hypertension. (Administrative Record (“AR”) 23, 59-61, 81-90, 158-60). An
 12 ALJ (the “prior ALJ”) examined the medical record and heard testimony from
 13 plaintiff on August 22, 2002. (AR 166).

14 On November 8, 2002, the prior ALJ issued an unfavorable decision
 15 denying benefits based upon the ALJ’s conclusion that plaintiff was not disabled
 16 at any time through the date of the decision (the “prior ALJ’s decision”). (AR
 17 170). The prior ALJ found: (1) plaintiff suffered from hypertension and a seizure
 18 disorder (AR 169); (2) plaintiff’s impairments or combination of impairments did
 19 not meet or medically equal one of the listed impairments (AR 169); (3) plaintiff
 20 had no exertional limitations, but her ability to work was limited by her need to
 21 avoid heights, by her need to avoid operating a motor vehicle, and by her need to
 22 avoid working around hazards in the workplace (AR 169); (4) plaintiff could
 23 perform her past relevant work as a secretary/administrative assistant (AR 169-
 24 70); and (5) plaintiff’s allegations of “excess” symptoms and functional limitations

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 26 ²The harmless error rule applies to the review of administrative decisions regarding
 27 disability. See Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1196
 28 (9th Cir. 2004) (applying harmless error standard); see also Stout v. Commissioner, Social
Security Administration, 454 F.3d 1050, 1054-56 (9th Cir. 2006) (discussing contours of
 application of harmless error standard in social security cases).

1 were not credible. (AR 169). Plaintiff did not appeal seek review of the prior
2 ALJ's decision. (JS 2).

3 **B. Applications In Issue**

4 On or about January 13, 2003, plaintiff filed subsequent applications for
5 Supplemental Security Income and Disability Insurance Benefits which are in
6 issue in the instant action. (AR 181-84, 423-25). Plaintiff asserted that she
7 became disabled in July 2001 due to seizures. (AR 195-204). The ALJ examined
8 the medical record and heard testimony from plaintiff (who was represented by
9 counsel), Rita Brown (the daughter of plaintiff's former guardian), and a
10 vocational expert on March 31, 2005. (AR 441-67).

11 On June 24, 2005, the ALJ determined that plaintiff was not disabled at any
12 time from November 8, 2002 – the date the prior ALJ's decision became final –
13 through the date of the decision. (AR 30). Specifically, the ALJ found:
14 (1) the prior ALJ's decision was final and binding and created a presumption of
15 continuing non-disability (AR 29); (2) plaintiff had not overcome the presumption
16 of continuing non-disability (AR 29); (3) plaintiff suffered from hypertension and
17 a seizure disorder (AR 29); (4) plaintiff's impairment or combination of
18 impairments did not meet or medically equal one of the listed impairments (AR
19 29); (5) plaintiff had no exertional limitations, but her ability to work was limited
20 by her need to avoid heights, by her need to avoid operating a motor vehicle, and
21 by her need to avoid working around hazards in the workplace (AR 30);
22 (6) plaintiff's allegations and testimony, Rita Brown's testimony, and the
23 statements of plaintiff's neighbor, Mary Burbank, regarding plaintiff's functional
24 limitations and "excess" symptoms were not entirely credible (AR 30).

25 The Appeals Council denied plaintiff's application for review. (AR 9-11).

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III. APPLICABLE LEGAL STANDARDS

A. Sequential Evaluation Process

To qualify for disability benefits, a claimant must show that she is unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of at least twelve months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant incapable of performing the work she previously performed and incapable of performing any other substantial gainful employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

In assessing whether a claimant is disabled, an ALJ is to follow a five-step sequential evaluation process:

- (1) Is the claimant presently engaged in substantial gainful activity? If so, the claimant is not disabled. If not, proceed to step two.
- (2) Is the claimant's alleged impairment sufficiently severe to limit her ability to work? If not, the claimant is not disabled. If so, proceed to step three.
- (3) Does the claimant's impairment, or combination of impairments, meet or equal an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1? If so, the claimant is disabled. If not, proceed to step four.
- (4) Does the claimant possess the residual functional capacity to perform her past relevant work?³ If so, the claimant is not disabled. If not, proceed to step five.

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³Residual functional capacity is "what [one] can still do despite [ones] limitations" and represents an "assessment based upon all of the relevant evidence." 20 C.F.R. §§ 404.1545(a), 416.945(a).

(5) Does the claimant's residual functional capacity, when considered with the claimant's age, education, and work experience, allow her to adjust to other work that exists in significant numbers in the national economy? If so, the claimant is not disabled. If not, the claimant is disabled.

Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920).

The claimant has the burden of proof at steps one through four, and the Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett); see also Burch, 400 F.3d at 679 (claimant carries initial burden of proving disability).

B. Standard of Review

Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of benefits only if it is not supported by substantial evidence or if it is based on legal error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457 (9th Cir. 1995)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

To determine whether substantial evidence supports a finding, a court must "consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [Commissioner's] conclusion." Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming or reversing the ALJ's conclusion, a court may not substitute its judgment for that of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

C. Presumption Based Upon the Prior ALJ's Decision

Although the Commissioner may apply res judicata to bar reconsideration of a disability claim with respect to a period during which the Commissioner has already determined that a claimant is not disabled, the Commissioner's authority to apply res judicata to a subsequent unadjudicated period is more limited. Lester v. Chater, 81 F.3d 821, 827 (9th Cir. 1995) as amended (1996). A prior final determination that a claimant is not disabled creates a presumption of continuing non-disability with respect to any subsequent unadjudicated period of alleged disability. Taylor v. Heckler, 765 F.2d 872, 875 (9th Cir. 1985); Lyle v. Secretary, 700 F.2d 566, 568 (9th Cir. 1983). The claimant can, however, overcome this burden by proving "changed circumstances," such as the existence of an impairment not previously considered, an increase in the severity of an impairment, or a change in the claimant's age category. See Vasquez v. Astrue, 572 F.3d 586, 597 (9th Cir. 2009) (finding two changed circumstances – new allegation of mental impairment not raised in prior application or addressed in prior denial and fact that claimant was approaching advanced age); Schneider v. Commissioner, 223 F.3d 968, 973 (9th Cir. 2000) (finding changed circumstances based on worse psychological test scores and diagnosis); Chavez v. Bowen, 844 F.2d 691, 693 (9th Cir. 1988) (attainment of advanced age constitutes changed circumstance precluding application of res judicata to first administrative law judge's ultimate finding against disability because advanced age often outcome-determinative under Medical-Vocational grids); Light v. Social Security Administration, 119 F.3d 789, 792 (9th Cir.), as amended (1997) (increased severity of carpal tunnel syndrome and diagnosis of ADHD constitute changed circumstances); Lester, 81 F.3d at 828 (finding two changed circumstances – new allegation of mental impairment not raised in prior application or addressed in prior denial and fact that claimant was approaching advanced age); Gregory v. Bowen, 844 F.2d 664, 666 (9th Cir. 1988) (res judicata could not be applied to bar

claim since claimant raised psychological impairment not previously considered); Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989) (en banc) (attainment of advanced age constitutes changed circumstance precluding application of res judicata to first administrative law judge's ultimate finding against disability); Taylor, 765 F.2d at 875 (finding claimant's condition improved rather than deteriorated and claimant failed to show requisite changed circumstances); Booz v. Secretary of Health & Human Services, 734 F.2d 1378, 1379-80 (9th Cir. 1984) (finding no changed circumstance).⁴

Even when a claimant has demonstrated changed circumstances and thus overcomes the presumption of continuing non-disability, a prior ALJ's findings concerning the claimant's residual functional capacity, education, and work experience or other findings required at a step in the sequential evaluation process

⁴Social Security Acquiescence Ruling 97-4(9), 1997 WL 742758, generally applies to cases involving a subsequent disability claim with an unadjudicated period arising under the same title of the Social Security Act as a prior claim on which there has been a final administrative decision that the claimant is not disabled. It directs adjudicators of the subsequent claim involving an unadjudicated period, to apply a presumption of continuing non-disability and to determine that the claimant is not disabled with respect to that period unless the claimant rebuts the presumption by showing a "changed circumstance" affecting the issue of disability with respect to the unadjudicated period. It also provides examples of "changed circumstances," which include an increase in the severity of the claimant's impairments, the alleged existence of an impairment not previously considered, and a change in the criteria for determining disability. Acquiescence Ruling 97-4(9) further instructs that if the claimant rebuts the presumption, adjudicators must nonetheless give effect to certain findings contained in the final decision on the prior claim, when adjudicating the subsequent claim. Specifically, adjudicators must adopt a finding of a claimant's residual functional capacity, education, work experience, or other findings required at a step in the sequential evaluation process for determining disability, which was made in the final decision on the prior disability claim with respect to the unadjudicated period unless there is new and material evidence relating to such a finding or there has been a change in the law, regulations or rulings affecting the finding or the method of arriving at the finding. Acquiescence Rulings are generally binding on all components of the Social Security Administration. 20 C.F.R. § 402.35 (b)(2). Courts generally defer to Social Security Rulings which are binding on the Social Security Administration unless they are plainly erroneous or inconsistent with the Social Security Act or regulations. Holohan v. Massanari, 246 F.3d 1195, 1202 n.1 (9th Cir. 2001); Paxton v. Secretary of Health & Human Services, 856 F.2d 1352, 1356 (9th Cir. 1988).

1 for determining disability, are still entitled to some res judicata consideration in
2 subsequent proceedings. Chavez, 844 F.2d at 693 (rejecting Commissioner's
3 assertion that res judicata should not apply to first ALJ's finding that claimant was
4 unable to perform past work in absence of showing that alleged "new and
5 material" evidence was in fact "new" and not previously presented to first ALJ;
6 holding that because second ALJ failed, *inter alia*, to afford preclusive effect to
7 prior ALJ's determinations that claimant had residual functional capacity of light
8 work, was of limited education, and was skilled or semi-skilled, second ALJ's
9 decision was not supported by substantial evidence); Social Security Acquiescence
10 Ruling 97-4(9), 1997 WL 742758 (if claimant rebuts presumption of continuing
11 nondisability, adjudicators must adopt prior findings of residual functional
12 capacity, education, work experience, or other findings required at a step in the
13 sequential evaluation process for determining disability, unless there is new and
14 material evidence relating to such finding or there has been change in law,
15 regulations or rulings affecting finding or method of arriving at the finding).

16 **IV. SUMMARY OF PERTINENT MEDICAL EVIDENCE**

17 **A. Martin Luther King/Drew Medical Center Records**

18 Between at least July 22, 1999 to March 24, 2005, plaintiff was seen and
19 treated at the Martin Luther King/Drew Medical Center ("MLK Medical Center"
20 or "MLK"). (AR 123-35, 261-303, 338-421). Among other physicians, plaintiff
21 was seen by neurologist, Dr. Lowell Nelson. (AR 167-68, 270-71, 277-78, 284-
22 85, 390-91, 394-95, 402-04).

23 Dr. Nelson's February 13, 2002 report reflects: Plaintiff reported that she
24 began to have seizures in the "early 90s" for unknown reasons. (AR 284). She
25 thought she had an average of two seizures per month. (AR 284). Plaintiff was
26 alert, oriented, attentive and briskly responsive. (AR 285). It was Dr. Nelson's
27 impression that plaintiff had probable secondarily generalized seizures of

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1 undetermined etiology at quite a high frequency (twice a month) despite
2 medication.

3 Dr. Nelson's July 23, 2002 report reflects: Plaintiff reportedly had had
4 seizures about once or twice monthly since her last visit – mostly small spells with
5 drooling from her mouth; one generalized convulsion in May. (AR 277). She had
6 missed a dose of medication a few days before her convulsion in May, and
7 reported having been under a lot of stress. (AR 277). Plaintiff indicated that her
8 encounters with her psychiatrist were stressful. (AR 277). There was no change
9 in plaintiff's condition since her last visit in February. (AR 277). It was Dr.
10 Nelson's impression that plaintiff had incomplete seizure control. (AR 277).

11 Dr. Nelson's December 3, 2002 report reflects: Plaintiff had reportedly
12 been under a high level degree of stress due to the unexpected death of an uncle,
13 difficulty returning to work given her age and uncontrolled seizures, and the
14 possibility of eviction from her home of twenty years. (AR 270). She reported
15 that she was having seizures twice a month despite medication. (AR 270). She
16 also reported having had some problems with depression, but noted that she was
17 menopausal, in addition to the various emotional stresses in her life. (AR 270).

18 Dr. Nelson's December 3, 2002 report reflects: There was no change in
19 plaintiff's condition. (AR 270). She was alert and normally responsive, but
20 appeared depressed and near to weeping at times. (AR 271). It was Dr Nelson's
21 impression that plaintiff still had unsatisfactory seizure control with moderate
22 levels of medication. (AR 271). He prescribed an increased dose of a specified
23 medication on a trial basis. (AR 271).

24 Dr. Nelson's April 8, 2003 report reflects: Plaintiff reportedly had had a
25 convulsion in February. (AR 267). She further reported that in March, during a
26 one week visit, her son had told her that she had had three recurrent seizures in her
27 sleep on one night, but none on the remaining nights of the week. (AR 267). She
28 reportedly had been unable to find a job, and had had a job interview that day,

1 which she interrupted to come to the clinic. (AR 267). There was no change in
2 plaintiff's condition. (AR 267). She was nervous and somewhat irritable and
3 frustrated that her seizures remained uncontrolled. She spent some time weeping
4 during the interview. (AR 267). It was Dr Nelson's impression that plaintiff had
5 incomplete seizure control. (AR 268). He further noted that she had had no
6 adverse effects from a specified medication and might tolerate an increase in dose,
7 which he prescribed. (AR 268).

8 Dr. Nelson's August 26, 2003 report reflects: Since her last visit, plaintiff
9 reportedly had had one small seizure at home in June, and what she assumed to be
10 a seizure the previous day while riding a bus to a job interview. (AR 402). She
11 reportedly found herself on the street, off the bus, and disoriented; when she
12 recovered her orientation she found herself about 10 miles from her intended
13 destination. (AR 402). Plaintiff indicated that she was excessively sleepy, enough
14 to significantly interfere with her normal functions. (AR 402). She stated: "If
15 someone found it in her heart to hire me, I don't think I could do the job because if
16 I sit still for half an hour I fall asleep. . . I'm going out of my damned mind. I
17 don't know where to go or what to do. . . I can't find a job. . . ." (AR 402).
18 Plaintiff reported that she had been looking for a job for the last year and a half
19 and that she had applied for a part time job but did not get it because, she was told,
20 they wanted someone who was bilingual. (AR 402). Plaintiff was tearful, angry,
21 and frustrated with her life, which had largely been destroyed by unemployment
22 resulting from seizures. (AR 402). It was Dr. Nelson's impression that plaintiff
23 still had incomplete seizure control, that the somnolence was probably a
24 medication side effect which substantially interfered with her function, but that it
25 did not appear that she could reduce her medications to address the issue of
26 somnolence.

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1 A November 3, 2003 report generated by the MLK Emergency Department
2 reflects that plaintiff reported having had a seizure the prior night while sleeping
3 and that her last seizure had occurred in July 2003. (AR 399).

4 On December 9, 2003, plaintiff again visited Dr. Nelson. (AR 394). Dr.
5 Nelson noted that plaintiff was angry and irritable, but that she communicated
6 quite clearly and rationally, and related well to the interview. (AR 394). He found
7 that plaintiff had grossly normal spontaneous movements and normal associated
8 movements. (AR 394). Dr. Nelson determined that there was unsatisfactory
9 seizure control. (AR 395). He also noted that plaintiff was markedly non-
10 compliant, with self adjustment of medications to essentially zero medications,
11 associated with generalized convulsion. (AR 395).

12 On April 14, 2004, plaintiff again visited Dr. Nelson. (AR 390). Dr.
13 Nelson's report reflects that although plaintiff remembered "no paroxysmal
14 activity," it appeared, based upon reports from her family, that they happened
15 about two or three times per month. (AR 390). Plaintiff had yet to take her
16 medication that day. (AR 390). Dr. Nelson concluded that plaintiff experienced
17 possible complex partial seizures, but no convulsions with her current dose of
18 medication. (AR 391). Treatment notes for the same date reflect that plaintiff was
19 alert and oriented and denied having had any seizures since her last visit. (AR
20 392).

21 MLK Medical Center treatment notes dated May 11, 2004, reflect that
22 plaintiff was non-compliant with her medications. (AR 370).

23 MLK Medical Center Neuroscience Outpatient Clinic treatment notes dated
24 December 1, 2004, reflect that plaintiff reported last having a seizure on
25 November 24, 2004 during her sleep, and that she had previously had a seizure in
26 May 2004. (AR 341).

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B. Hubert H. Humphrey Comprehensive Health Center Medical Evidence

Between at least August 27, 2001 and March 17, 2003, plaintiff was seen and treated by multiple different medical practitioners at the Hubert H. Humphrey Comprehensive Health Center (“HHH Health Center” or “HHH”) in Los Angeles. (AR 231-60). Treatment notes dated June 11, 2002, reflect that plaintiff admitted to anxiety problems and was going to see a psychiatrist. (AR 246). Treatment notes dated September 24, 2002, reflect that plaintiff’s anxiety was being followed by a psychiatrist. (AR 242).

C. Treating Psychologist/Psychiatrist – Dr. Ferrara-Guthrie

Between May 10, 2002 and at least March 2005, plaintiff was seen by treating psychologist/psychiatrist Dr. Ferrara-Guthrie of the August Hawkins Mental Health Clinic. (AR 154-55, 330, 422). Plaintiff was initially seen “for depression associated with her medical condition, seizure disorder, and the consequent inability to find employment.” (AR 330). Plaintiff reported “interrupted sleep, anxiety, feeling hopeless & helpless and [being] unable to be entirely independent. (AR 330). Dr. Ferrara-Guthrie noted that plaintiff’s lack of employment had “caused a number of insurmountable hurdles, beginning with inability to pay for housing & possibly becoming homeless and more hopeless and helpless.” (AR 330).

On August 26, 2002, Dr. Ferrara-Guthrie completed a “Physician’s Supplementary Certificate” which reflects: Her primary diagnosis was that plaintiff suffered from a mood disorder to due to a medical condition.⁵ (AR 155). Plaintiff had a seizure disorder which impaired her ability to function at work, causing depression and memory loss. (AR 155). Plaintiff’s continued seizures

⁵In the space calling for the primary diagnosis, Dr. Ferrara-Guthrie inserted the code 293.83 which is the code corresponding to a diagnosis of “Mood Disorder Due to Medical Condition” in the Diagnostic and Statistical Manual of Mental Disorders (“DSM-IV”) (4th ed. 2000).

1 rendered her unable to obtain employment. (AR 155). She was unable to function
2 independently for lack of funds due to unemployment and emotional stress. (AR
3 155).

4 On October 30, 2003, Dr. Ferrara-Guthrie generated a handwritten letter in
5 which she noted the following: She had seen plaintiff approximately eleven times.
6 (AR 330). Plaintiff's situation had not improved. (AR 330). Plaintiff reportedly
7 had an "acute outburst" on October 2, 2003, while being interviewed at the Social
8 Security Office, during which she cried, screamed and stated that she could not
9 "keep on like this." (AR 330). Dr. Ferrara-Guthrie diagnosed plaintiff with
10 depression not otherwise specified vs. depression secondary to general medical
11 condition (seizure disorder). (AR 330).

12 On March 22, 2005, Dr. Ferrara-Guthrie generated another handwritten
13 letter in which she noted the following: Plaintiff's condition had not changed
14 since October 2003. (AR 422). She had become more hopeless given her inability
15 to find work and therefore to support herself due to her continued medical
16 debilitating condition: seizure disorder. (AR 422). Plaintiff's current psychiatric
17 diagnosis was depression not otherwise specified, ruling in a depression due to
18 seizure disorder. (AR 422). Plaintiff would be unable to find employment due to
19 her disabling neurological condition and therefore needed financial support for her
20 sustenance. (AR 422).

21 **D. Consultative Examiner – Dr. Nguyen**

22 On June 13, 2003, plaintiff underwent a complete psychiatric evaluation by
23 consultative examiner, Dr. Nguyen, of the East West Medical Group. (AR 304-
24 07). Dr. Nguyen's report reflects: Plaintiff had no history of psychiatric
25 hospitalization or outpatient treatment, and was not seeing a psychiatrist at the
26 time. (AR 304). Her speech was normal, spontaneous, goal-directed and
27 articulate. (AR 305). Plaintiff did not show any abnormal, bizarre or psychotic
28 behavior, and was cooperative. (AR 305). Plaintiff's affect was unremarkable,

1 and she had no suicidal or homicidal ideation. (AR 305). Plaintiff had no
2 looseness of association and no paranoid ideation, delusions, auditory or visual
3 hallucinations. (AR 306). Plaintiff was oriented times four and was able to recall
4 three out of three objects immediately and after five minutes. (AR 306). She was
5 able to recall 7 digits going forward and 4 digits going backwards. (AR 306). She
6 could do simple math, was able to name the current and recent past Presidents, and
7 gave appropriate responses to questions regarding the similarities between two
8 objects and what to do in an emergency. (AR 306). There was no evidence of a
9 psychiatric disorder and no evidence of any particular psychiatric diagnosis at the
10 time. (AR 306). Plaintiff's mental status examination was unremarkable. (AR
11 306). She could focus and maintain attention, and could understand, remember
12 and follow instructions. (AR 306). She was competent to manage her own funds.
13 (AR 306).

14 **E. State Agency Physician – Dr. Kalmar**

15 On June 23, 2003, State Agency Physician Dr. Kalmar completed a Physical
16 Residual Functional Capacity Assessment in which such doctor opined: Plaintiff
17 had no exertional, postural, manipulative, visual, or communicative limitations.
18 (AR 309-13). Although she should avoid concentrated exposure to hazards
19 (machinery, heights, etc.), she had no other environmental limitations. (AR 313).

20 **V. DISCUSSION**

21 **A. The ALJ's Assessment of the Opinions of Plaintiff's Treating**
22 **Psychologist/Psychiatrist**

23 Plaintiff contends that the ALJ erroneously failed to give appropriate weight
24 to the opinion of her treating psychologist/psychiatrist, Dr. Ferrara-Guthrie. (JS
25 3). This Court finds no material error in the ALJ's assessment of this medical
26 opinion.

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1. Applicable Law

In Social Security cases, courts employ a hierarchy of deference to medical opinions depending on the nature of the services provided. Courts distinguish among the opinions of three types of physicians: those who treat the claimant (“treating physicians”) and two categories of “nontreating physicians,” namely those who examine but do not treat the claimant (“examining physicians”) and those who neither examine nor treat the claimant (“nonexamining physicians”). Lester, 81 F.3d at 830 (footnote omitted). A treating physician’s opinion is entitled to more weight than an examining physician’s opinion, and an examining physician’s opinion is entitled to more weight than a nonexamining physician’s opinion.⁶ See id. In general, the opinion of a treating physician is entitled to greater weight than that of a non-treating physician because the treating physician “is employed to cure and has a greater opportunity to know and observe the patient as an individual.” Morgan v. Commissioner of Social Security Administration, 169 F.3d 595, 600 (9th Cir. 1999) (citing Sprague v. Bowen, 812 F.2d 1226, 1230 (9th Cir. 1987)).

The treating physician’s opinion is not, however, necessarily conclusive as to either a physical condition or the ultimate issue of disability. Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989) (citing Rodriguez v. Bowen, 876 F.2d 759, 761-62 & n.7 (9th Cir. 1989)). Where a treating physician’s opinion is not contradicted by another doctor, it may be rejected only for clear and convincing reasons. Orn v. Astrue, 495 F.3d 625, 632 (9th Cir. 2007) (citation and internal quotations omitted). The ALJ can reject the opinion of a treating physician in favor of a conflicting opinion of another examining physician if the ALJ makes findings setting forth specific, legitimate reasons for doing so that are based on

⁶Cf. Le v. Astrue, 529 F.3d 1200, 1201-02 (9th Cir. 2008) (not necessary or practical to draw bright line distinguishing treating physicians from non-treating physicians; relationship is better viewed as series of points on a continuum reflecting the duration of the treatment relationship and frequency and nature of the contact) (citation omitted).

substantial evidence in the record. Id. (citation and internal quotations omitted); Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002) (ALJ can meet burden by setting out detailed and thorough summary of facts and conflicting clinical evidence, stating his interpretation thereof, and making findings) (citations and quotations omitted); Magallanes, 881 F.2d at 751, 755 (same; ALJ need not recite “magic words” to reject a treating physician opinion – court may draw specific and legitimate inferences from ALJ’s opinion). “The ALJ must do more than offer his conclusions.” Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988). “He must set forth his own interpretations and explain why they, rather than the [physician’s], are correct.” Id. “Broad and vague” reasons for rejecting the treating physician’s opinion do not suffice. McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir. 1989).

2. The ALJ’s Assessment of Dr. Ferrara-Guthrie’s Opinions

In the ALJ’s decision, the ALJ expressly addressed the opinions of Dr. Ferrara-Guthrie, noting that such doctor had opined that plaintiff was disabled as a result of a seizure disorder and a nonspecific depressive disorder. (AR 27). The ALJ affirmatively rejected Dr. Ferrara-Guthrie’s opinion and gave it no weight assertedly because (1) the opinion was unsupported by treatment notes; (2) a finding of disability is a legal determination reserved for the ALJ – Dr. Ferrara-Guthrie was only qualified to give an opinion about plaintiff’s functional abilities; and (3) the opinion was completely contradicted by the findings of Dr. Nguyen and Dr. Kalmar. (AR 27) (citing Exhibits B-3F [AR 304-07] and B-5F [AR 309-16]).

3. Analysis

As a threshold matter, this Court declines to apply, and finds that the ALJ erred in applying, the presumption of continuing non-disability to the unadjudicated period post-dating the prior ALJ’s decision because plaintiff turned 50 after the date of the prior ALJ’s decision and thus entered the “closely

1 approaching advanced age” category as defined by the applicable regulations. See
 2 Vasquez v. Astrue, 572 F.3d at 597-98 (fact that claimant turned 50 after date of
 3 earlier decision and thus entered the “closely approaching advanced age” category
 4 was a changed circumstance precluding application of presumption of continuing
 5 non-disability); Lester, 81 F.3d at 828 (same).⁷ This Court nonetheless finds that
 6 the ALJ did not materially err in rejecting Dr. Ferrara-Guthrie’s opinion because
 7 such rejection is supported by findings setting forth specific, legitimate reasons for
 8 doing so that are based on substantial evidence in the record.

9 As noted above, the ALJ cited three reasons for rejecting Dr. Ferrara-
 10 Guthrie’s opinion: (1) her opinion was unsupported by treatment notes; (2) her
 11 opinion that plaintiff was disabled was a legal opinion reserved for the ALJ; and
 12 (3) her opinion was contradicted by Drs. Nguyen and Kalmar.⁸ As to the first
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 15 ⁷However, to the extent plaintiff intends to contest that res judicata applied to the period
 16 covered by the prior ALJ’s decision, she is mistaken. The Commissioner may, as the
 17 Commissioner did here, apply res judicata to bar reconsideration of a period with respect to
 18 which the Commissioner has already made a determination, by declining to reopen the prior
 19 application. Lester, 81 F.3d at 827. As a general matter subject to an exception not applicable
 20 here, the Commissioner’s refusal to reopen the Commissioner’s decision as to the previously
 21 adjudicated period is not subject to review. Id. The Court further notes that it rejects plaintiff’s
 22 suggestion that the mere presence of new medical evidence in the record would preclude
 23 application of the presumption of continuing non-disability. (JS 10-11). While the records in
 issue may be “new,” plaintiff fails to identify what contained within the records is “material” or
 constitutes a “changed circumstance.” Accordingly, but for the fact that plaintiff had entered the
 “closely approaching advanced age” category since the issuance of the prior ALJ’s decision, this
 Court would apply the presumption of continuing non-disability to the period post-dating the
 prior ALJ’s decision.

24 ⁸Defendant suggests that the ALJ also rejected Dr. Ferrara-Guthrie’s opinion because of
 25 gaps in plaintiff’s medical treatment. (JS 8). However, although the ALJ discussed plaintiff’s
 26 gaps in medical treatment in the paragraph immediately following the ALJ’s discussion of Dr.
 27 Ferrara-Guthrie’s opinion, it does not appear to this Court that such was a basis upon which the
 28 ALJ rejected Dr. Ferrara-Guthrie’s opinion. The Court makes this assessment because the ALJ
 devoted a single paragraph to discussing Dr. Ferrara-Guthrie’s opinion and ended such paragraph
 with the sentence “For these reasons, the Administrative Law Judge does not give any weight to
 this opinion.” (AR 27). Accordingly, this Court does not address, in this section, the parties’
 respective contentions regarding the gaps in plaintiff’s medical treatment.

1 reason, plaintiff argues that Dr. Ferrara-Guthrie's opinion is supported by
 2 treatment notes from *another*, unaffiliated treating physician, Dr. Nelson. (JS 3).
 3 Even assuming this to be true, it misses the point. A treating doctor's opinion
 4 about the severity of the claimant's impairments can properly be discounted if the
 5 opinion is unsupported by the doctor's *own* treatment notes. See Connett v.
 6 Barnhart, 340 F.3d 871, 875 (9th Cir. 2003); see also Saelee v. Chater, 94 F.3d
 7 520, 522 (9th Cir. 1996) (variance between physician's opinion and his own
 8 treatment notes may be used to deem opinion untrustworthy), cert. denied, 519
 9 U.S. 1113 (1997).⁹

10 Although plaintiff does not address the second reason articulated by the
 11 ALJ, this Court notes that the ALJ was not bound by the Dr. Ferrara-Guthrie's
 12 opinion on the ultimate issue of disability. See 20 C.F.R. §§ 404.1527(e)(1),
 13 416.927(e)(1); Tommasetti v. Astrue, 533 F.3d 1035, 1041 (9th Cir. 2008). The
 14 ALJ was nonetheless required to provide specific and legitimate reasons to reject
 15 such opinion. Tommasetti, 533 F.3d at 1041. As discussed herein, the ALJ did
 16 so.

17 As to the third reason articulated by the ALJ to reject Dr. Ferrara-Guthrie's
 18 opinion – the fact that it was contradicted by the opinions of Drs. Nguyen and
 19 Kalmar – plaintiff contends that such opinions do not constitute substantial
 20 evidence and were erroneously relied upon by the ALJ. However, Dr. Nguyen
 21 personally examined plaintiff, administered objective tests, and made independent
 22 clinical findings. When an examining physician provides independent clinical
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 25 ⁹Plaintiff, citing Montijo v. Secretary of Health and Human Services, 729 F.2d 599, 601
 26 (9th Cir. 1984), argues that a physician's inability to support his findings with objective support
 27 is not a clear and convincing reason to reject his opinion. However, even assuming that the
 28 absence of supporting treatment notes is legally equivalent to the absence of supporting objective
 medical evidence, this case is distinguishable from Montijo because Dr. Ferrara-Guthrie's
 opinion is contradicted by other medical opinions in the record. See Andrews v. Shalala, 53 F.3d
 1035, 1041-42 (9th Cir. 1995) (distinguishing Montijo because in that case, the medical opinions
 in issue were uncontroverted).

findings that differ from the findings of a treating physician, such examiner's findings themselves constitute substantial evidence. Orn, 495 F.3d at 632. Here, Dr. Nguyen's opinion was buttressed by that of Dr. Kalmar. Although plaintiff points out that Dr. Nguyen did not review plaintiff's medical records and that the Dr. Kalmar did not examine plaintiff – facts which were certainly appropriate for the ALJ to consider in assessing the weight to give to such opinions – the ALJ is responsible for resolving conflicts in medical testimony. Magallanes, 881 F.2d at 750.

As the ALJ in this case rejected Dr. Ferrara-Guthrie's opinions by setting forth specific, legitimate reasons for doing so that are based on substantial evidence in the record, plaintiff is not entitled to a reversal or remand based upon the instant claim.

B. The ALJ's Determination That Plaintiff Did Not Suffer from a Severe Mental Impairment

Plaintiff argues that the ALJ erred in failing to find that plaintiff suffered from a severe mental impairment. (JS 11). Defendant disagrees. This Court finds that the ALJ's determination that plaintiff did not suffer from a severe mental impairment is supported by substantial evidence and is free from material error.

1. Applicable Law

As noted above, plaintiff has the burden of proving that she has a severe impairment at step two of the sequential evaluation process. An impairment is severe if it significantly limits one's ability to perform basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). An impairment is "non-severe" if it does not significantly limit one's physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1521(a), 416.921(a). Basic work activities are the "abilities and aptitudes necessary to do most jobs," such as (1) physical functions like walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, and handling; (2) the capacity for seeing, hearing, and speaking; (3) understanding, carrying out, and

1 remembering simple instructions; (4) the use of judgment; (5) responding
 2 appropriately to supervision, co-workers, and usual work situations; and
 3 (6) dealing with changes in a routine work setting. 20 C.F.R. §§ 404.1521(b),
 4 416.921(b).

5 Step two is “a de minimis screening device [used] to dispose of groundless
 6 claims.” Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996). An ALJ may find
 7 that a claimant lacks a medically severe impairment or combination of
 8 impairments only when this conclusion is clearly established by medical evidence.
 9 Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005) (citation omitted). Applying
 10 the normal standard of review to the requirements of step two, a court must
 11 determine whether an ALJ had substantial evidence to find that the medical
 12 evidence clearly established that the claimant did not have a medically severe
 13 impairment or combination of impairments. Webb, 433 F.3d at 687; see also
 14 Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir. 1988) (“Despite the deference
 15 usually accorded to the Secretary’s application of regulations, numerous appellate
 16 courts have imposed a narrow construction upon the severity regulations applied
 17 here.”).

18 **2. The ALJ’s Decision Regarding Plaintiff’s Alleged Mental** 19 **Impairment**

20 The ALJ determined that the medical record did not support a finding that
 21 plaintiff had any significant limitations in her mental functioning abilities. (AR
 22 26). The ALJ noted that plaintiff had never required psychiatric hospitalization
 23 and that when plaintiff was evaluated by the consultative psychiatric examiner, she
 24 did not show any bizarre or psychotic behavior. (AR 26). Instead, her speech was
 25 normal, spontaneous, and goal-directed. (AR 27). She had no suicidal or
 26 homicidal ideation. (AR 27). Her psychomotor activity was within normal limits.
 27 (AR 27). She had no looseness of association, paranoid ideation, delusions or
 28 auditory/visual hallucinations. (AR 27). The ALJ noted that the consultative

1 examiner had concluded that plaintiff had no evidence of a psychiatric disorder
2 and had opined that plaintiff was able to focus and maintain attention as well as
3 understand, remember, and follow instructions. (AR 27) (citing Exhibit B-3F [AR
4 304-07 – Dr. Nguyen’s report]). The ALJ pointed to multiple treatment notes
5 between December 2002 and February 2005 which reflect that plaintiff was alert
6 and oriented. (AR 28) (citing Exhibit B-2F at 4, 10 [AR 264, 270 – MLK
7 records], Exhibit B-1F at 7 [AR 237 – HHH records], Exhibit B-9F at 3, 21, 55,
8 59, 60, 68 [AR 341, 359, 392, 396, 397, 405 – MLK records] and Exhibit B-10F at
9 4 [AR 420 – MLK records]. The ALJ also considered and rejected Dr. Ferrara-
10 Guthrie’s opinion regarding plaintiff’s alleged mental impairment for the reasons
11 discussed above. (AR 27).

12 **3. Analysis**

13 Plaintiff contends that medical evidence from three sources demonstrates
14 that she had a severe mental impairment: (1) HHH records in June 2002 and
15 September 2002 which reflect that she had an anxiety problem and was referred to
16 a psychiatrist; (2) MLK records in April 2003 and August 2003 which reflect that
17 she was nervous, somewhat irritable, weeping, tearful, angry, and frustrated with
18 her life; and (3) Dr. Ferrara-Guthrie’s diagnosis that plaintiff had depression, not
19 otherwise specified due to her uncontrolled seizure disorder, and had symptoms of
20 hopelessness and helplessness.

21 First, to the extent plaintiff’s position is predicated upon Dr. Ferrara-
22 Guthrie’s opinion, plaintiff fails to meet her burden to demonstrate that she
23 suffered from a severe mental impairment because, as discussed above, the ALJ
24 properly rejected such opinion.

25 Second, even including and crediting Dr. Ferrara-Guthrie’s opinion,
26 plaintiff still fails to meet her burden to demonstrate that she suffered from a

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1 severe mental impairment – *i.e.*, an impairment that significantly limited her
 2 ability to perform basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c).¹⁰

3 Third, substantial evidence in the form of Dr. Nguyen’s opinion, clearly
 4 supports the ALJ’s determination that plaintiff did not suffer from a severe
 5 impairment.¹¹ The record also supports the ALJ’s reliance on the remaining
 6 medical evidence cited in support of the ALJ’s conclusion that plaintiff did not
 7 suffer from a severe mental impairment.

8 As plaintiff has failed to meet her burden to demonstrate that plaintiff
 9 suffered from a severe mental impairment and as the ALJ’s determination that
 10 plaintiff did not suffer from a severe mental impairment is supported by
 11 substantial evidence and is free from material error, plaintiff is not entitled to a
 12 reversal or remand on this claim.

13 **C. The ALJ’s Assessment of Plaintiff’s Credibility**

14 Plaintiff asserts that the ALJ failed properly to evaluate plaintiff’s
 15 subjective symptoms and credibility. Defendant disagrees. This Court finds that
 16 the ALJ’s assessment of plaintiff’s subjective symptoms and credibility is
 17 supported by substantial evidence and is free from material error.

18 **1. Applicable Law**

19 Questions of credibility and resolutions of conflicts in the testimony are
 20 functions solely of the Commissioner. Greger v. Barnhart, 464 F.3d 968, 972 (9th
 21 Cir. 2006). If the ALJ’s interpretation of the claimant’s testimony is reasonable
 22 and is supported by substantial evidence, it is not the court’s role to “second-
 23 guess” it. Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

25
 26 ¹⁰The record contains a report of a May 21, 2003 contact with plaintiff which reflects:
 “[Plaintiff] admits that she has no mental restrictions from work or function[.]”

27
 28 ¹¹For the reasons discussed in Part VA3, this Court rejects plaintiff’s contention that the
 opinion of Dr. Nguyen does not constitute substantial evidence.

1 An ALJ is not required to believe every allegation of disabling pain or other
2 non-exertional impairment. Orn, 495 F.3d at 635 (citing Fair v. Bowen, 885 F.2d
3 597, 603 (9th Cir. 1989)). If the record establishes the existence of a medically
4 determinable impairment that could reasonably give rise to symptoms assertedly
5 suffered by a claimant, an ALJ must make a finding as to the credibility of the
6 claimant's statements about the symptoms and their functional effect. Robbins,
7 466 F.3d 880 at 883 (citations omitted). Where the record includes objective
8 medical evidence that the claimant suffers from an impairment that could
9 reasonably produce the symptoms of which the claimant complains, an adverse
10 credibility finding must be based on clear and convincing reasons. Carmickle v.
11 Commissioner, Social Security Administration, 533 F.3d 1155, 1160 (9th Cir.
12 2008) (citations omitted). The only time this standard does not apply is when
13 there is affirmative evidence of malingering. Id. The ALJ's credibility findings
14 "must be sufficiently specific to allow a reviewing court to conclude the ALJ
15 rejected the claimant's testimony on permissible grounds and did not arbitrarily
16 discredit the claimant's testimony." Moisa v. Barnhart, 367 F.3d 882, 885 (9th
17 Cir. 2004).

18 To find the claimant not credible, an ALJ must rely either on reasons
19 unrelated to the subjective testimony (e.g., reputation for dishonesty), internal
20 contradictions in the testimony, or conflicts between the claimant's testimony and
21 the claimant's conduct (e.g., daily activities, work record, unexplained or
22 inadequately explained failure to seek treatment or to follow prescribed course of
23 treatment). Orn, 495 F.3d at 636; Robbins, 466 F.3d at 883; Burch, 400 F.3d at
24 680-81; SSR 96-7p. Although an ALJ may not disregard a claimant's testimony
25 solely because it is not substantiated affirmatively by objective medical
26 evidence, the lack of medical evidence is a factor that the ALJ can consider in his
27 credibility assessment. Burch, 400 F.3d at 681.

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2. Analysis

First, for the reasons discussed in Part VA3, above, this Court rejects defendant's assertion that the ALJ's decision should be affirmed based upon a presumption of continuing non-disability.

Second, however, the Court nonetheless affirms the ALJ's determination regarding plaintiff's credibility because the ALJ provided clear and convincing reasons which are supported by substantial evidence in the record. The ALJ rejected plaintiff's allegations and testimony regarding "excess" symptoms and functional limitations because plaintiff assertions were (1) contradicted by treatment notes (as detailed by the ALJ with multiple citations to the record); and (2) contradicted by plaintiff's conduct in multiple respects, *e.g.*, her non-compliance with a prescribed course of treatment, her failure to seek continuous treatment, her active seeking of employment (again, as detailed by the ALJ with multiple citations to the record). (AR 27-29). These are appropriate bases upon which to reject a claimant's credibility. See Orn, 495 F.3d at 636 (Factors that ALJ may consider in weighing claimant's credibility include inconsistency between testimony and conduct, and unexplained or inadequately explained failure to seek treatment or follow prescribed course of treatment). Plaintiff correctly notes that the failure to seek treatment where a plaintiff cannot afford to seek it is not an appropriate basis upon which to discount a claimant's credibility. (JS 17). However, the only evidence cited by plaintiff for her current assertion that she did not seek treatment because she could not afford it, is an at best ambiguous statement by Rita Brown – a witness whose credibility the ALJ rejected in a finding that is not challenged here. (JS 17). Plaintiff points to no testimony or statements of her own in the record which suggest that she refrained from seeking treatment or failed to take her prescribed medication for financial reasons or other adequately explained reasons.

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1 In short, plaintiff is not entitled to reversal or remand on this claim because
2 the ALJ's articulated reasons for rejecting her allegations are clear and convincing
3 and are supported by substantial evidence in the record.

4 **VI. CONCLUSION**

5 For the foregoing reasons, the decision of the Commissioner of Social
6 Security is affirmed.

7 LET JUDGMENT BE ENTERED ACCORDINGLY.

8 DATED: August 19, 2009

9 /s/

10 Honorable Jacqueline Chooljian
11 UNITED STATES MAGISTRATE JUDGE
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